No. 4052

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE CHOY,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT AND TERRITORY OF HAWAII

BRIEF FOR DEFENDANT IN ERROR

JOHN T. WILLIAMS,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,

WILLIAM T. CARDEN,
United States Attorney, Hawaii,
Attorneys for Defendant in Error.

Neal, Stratford & Kerr, S. F. 34695

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I.

STATEMENT OF THE CASE.

This is a writ of error to the United States District Court of the District and territory of Hawaii, prosecuted by Lee Choy to reverse the judgment of conviction rendered against him by that court.

On October 21, 1922 (not November 20, 1922), the Grand Jury of the United States District Court of Hawaii, indicted the plaintiff in error on two counts for violations of laws respecting narcotic drugs.

The first count was based upon Section 2 of the Act known as "Narcotic Drugs Import and Export Act." The Act was originally passed and approved February 9, 1909, 35 Stat., 614. It was amended on January 17, 1914, 38 Stat., 275, and was further amended May 26, 1922, 42 Stat., 596.

The charging part of the first count is as follows: "The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that

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on or about the 18th day of October, 1922, at and within the said District and within the jurisdication of this Court did unlawfully, fraudulently, knowingly, and feloniously receive, conceal, buy, sell and facilitate the transportation, concealment and sale of, after having been imported and brought into the United States, a certain narcotic drug, said narcotic drug then and there being a derivative and preparation of opium, to wit, 20 five-tael tins of opium, all of which said narcotic drug as he, the said Lee Choy, then and there well knew had been theretofore unlawfully imported and brought into the United States, contrary to the form of the statute in such

case made and provided and against the peace and dignity of the United States.

(Sgd) WILLIAM T. CARDEN,
United States Attorney."
Record, p. 12.

The conviction of plaintiff in error rests alone on Count One; but owing to the points made by him, reference is also made to the second count of the indictment.

The second count was based upon the "Harrison Narcotic Act", approved December 17, 1914, 38 Stat., 785, as amended by section 1006 of the Revenue Act of 1918, 40 Stat., 1130, and further reenacted by Section 1005 of the Revenue Act of 1921, 42 Stat., 298.

The charging part of the second count is as follows:

"The Grand Jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oaths, present that on or about the 18th day of October, 1922, at and within the said District and within the jurisdiction of this court, did knowingly, unlawfully, fraudulently and feloniously purchase, sell, dispense and distribute 20 five-tael tins of opium from packages to which there was not then and there affixed the tax-paid stamp required by law, which said opium then and there was a compound, manufacture, salt,

derivative and preparation of opium and was so purchased, sold, dispensed and distributed by the said Lee Choy, as aforesaid, not then and there being in the original stamped package and not being then and there taken from an original stamped package; contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

(Sgd.) WILLIAM T. CARDEN,
United States Attorney."
Record, p. 13.

The defendant was acquitted on the second count.

Thereupon the court on December 9, 1922, sentenced defendant to be imprisoned in Oahu prison at Honolulu for a term of two years and pay a fine of 250 and costs.

There is no bill of exceptions in the record. Apparently no such document was ever settled or allowed. There is furnished merely a transcript to which the reporter adds the certificate that it is a true transcript of his shorthand notes. Record, page 527. There is contained in the record what purports to be a copy of certain instructions proposed by the defendant and refused, but the statement is not contained in any bill of exceptions nor attested in any manner whatsoever. Record pages 52-61.

If we were to refer to the reporter's transcript it would appear that the facts lie in brief compass;

that the defendant procured a certain Mrs. Alapa to assist him in landing certain tins of smoking opium from a steamer docked at Honolulu en route from China; that thereupon the woman went aboard the steamer and going to a particular part of the ship removed her outer dress, thereupon the defendant assisted her in putting on a certain jacket containing certain pockets in which had been placed the tins of opium. The woman then went ashore and delivered the opium to the defendant. Record pages 67-75.

A subsequent trip of the same character was attempted and while going off the ship the woman was arrested and the opium seized. Record pages 77-79. The defendant submitted certain testimony in the form of an alibi which the jury evidently did not believe.

The only specifications of error now urged upon this Court in the brief filed on behalf of plaintiff in error are the following:

1. That the indictment was void and required the discharge of the defendant.

2. That the court erred in refusing to instruct the jury that each juryman must be convinced beyond a reasonable doubt before the defendant could be found guilty.

3. That the verdict is inconsistent and repugnant and therefore void.

We confine our argument to the three points so presented.

II.

(A) THE INDICTMENT IS SUFFICIENT; IT IS NOT VOID; IT IS NOT EVEN IMPROPER IN FORM.

Count one of the indictment above set forth clearly states an offense against the laws of the United States under the "Narcotic Drugs and Import Act". It contains all the elements of the crime denounced by that statute. Tested by the rule that it should follow the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense, the indictment is amply sufficient. An application of the rule is seen in the case of

Young vs. United States, 212 Fed. 967, 968.

The plaintiff in error does not controvert but that if the charging portion of the count above quoted be considered, a public offense is there charged. Indeed, it is stated on page 9 of defendant's brief that the matters set forth on pages 13 and 14 of the record "Was what might have constituted a sufficient indictment in the absence of the first purported indictment". Thereupon the argument seems to be adduced that the matters appearing on pages 13

and 14 of the record are not part of the indictment, but that the only indictment or document to be considered as an indictment was what appears on pages 11 and 12 of the record.

Thus the sufficiency of the count as quoted by us above is in no respect challenged, the argument of defendant being based upon the premise that it is not a part of the indictment. We think that it clearly appears from an inspection of the printed record and especially from an examination of the manuscript record filed in the office of the Clerk that this premise is wholly without basis.

The record as sent up by the Clerk below is not neatly arranged. The proper arrangement would be to state each document according to its tenor and follow it by the various endorsements including the filing mark. In the arrangement of the record in the instant case, the Clerk has reversed this arrangement in the case not only of the indictment but of all other documents included in the transcript. The Clerk apparently has copied the endorsements usually found upon the back of the document, including the filing mark, names of parties, etc., immediately preceding the document in question. This is also true of the verdict (Record pages 14 and 15); of the order allowing writ of error (Record pages 30 and 31); of the writ of error itself (Record pages 32 and 33); of the citation on writ of error (Record pages 34 and 35); of the recognizance for costs (Record pages 36 and 37); of the recognizance for

bail (Record pages 40 and 41). The copy of the verdict for example is commenced by copying the filing mark (Record page 14). In printing the record, the printer has so arranged the filing endorsement of the verdict that it would appear to a casual reader that it would refer to the filing of the indictment (Record page 14). This apparently mislead counsel for plaintiff in error, but a close inspection as well as an inspection of the original manuscript record indicates that the filing mark in question refers to the verdict following. The figures "17" in brackets following the words "United States attorney" would indicate that the page of the manuscript there ended.

And so in the case of the indictment the Clerk of the Court below first set out the filing mark (Record page 11), and followed it by the matter appearing on the back of the indictment as endorsement, including the endorsement "A true bill by the foreman of the Grand Jury". After setting out this endorsement, he copies the indictment proper. This deficiency in the arrangement is manifest from an inspection of the record as above indicated. In truth the plaintiff in error is not without responsibility for this confused arrangement of the record. It is his duty to furnish to this court a proper copy of the record. If we should reason as he does that, owing to the fact that the endorsement portion of the indictment appears first that that alone could be considered as the document in question, and if

insufficient, that the insufficiency is fatal, we could by the same token show that a similar deficiency exists in the very writ of error upon which the jurisdiction of this court can be shown to rest, for there is a similar misarrangement of the endorsements and filing mark of the writ.

In the case of the indictment here, the whole document appears in the record and there is no ground for discarding any portion of it. It would thus appear at the worst that the matter usually constituting endorsements on the back of the endorsement, including the endorsement of "True Bill", had appeared upon the face or first page. But such an endorsement of the words "True bill" would not be defective for the reason that the indictment would be valid if it had in fact been returned even though it had never been so endorsed at all as was precisely held in the case of

Frisbie vs. U. S., 157 U. S. 160, 39 L. ed. 657.

In this case it is held that the lack of endorsement in question is not fatal to the indictment.

Moreover, as was further held in the case of *Frisbie vs. United States,* cited, the defect now urged is waived unless objection is made in the first instance; that at best the objection is merely as to form and is cured by the verdict under the provisions of Section 1025 R. S. Here if there was anything whatever in the point it should have been made at the threshold by motion to quash. No such motion was

made nor was any other objection made in the court below.

These considerations are further enforced from an inspection of the recitals of the judgment appearing at pages 17, 18, 19 and 20 of the record. It is seen that the judgment contains recitals of statements made by the court at the time the defendant was arraigned for judgment which showed conclusively that on October 21, 1922, the defendant was regularly indicted by the Grand Jury and that the first count of the indictment charged him with the crime for which we now contend he was tried and convicted. This sentence and judgment is a part of the strict record and may now be considered by this court.

We submit that it is clear that the only points urged against the indictment by counsel is based upon the premise wholly unfounded.

(B) THE PROPRIETY OR CORRECTNESS OF THE COURT'S ACTION IN GIVING OR REFUSING INSTRUCTIONS DOES NOT ARISE UPON THE RECORD; IF WE COULD CONSIDER DOCUMENTS PRINTED IN THE RECORD IT STILL APPEARS THAT THE ACTION OF THE COURT WAS ENTIRELY PROPER.

It is argued that the Court erred in refusing to instruct the jury that each individual juryman must be convinced beyond a reasonable doubt before the

defendant could be found guilty, but in the absence of a bill of exceptions we insist that the point cannot be reviewed. The portion of the record referred to as containing two certain instructions proposed by the defendant and refused, being page 58 of the record, simply refers to a print in that portion of the record of what may have been certain instructions so proposed, but they are not included in any bill of exceptions or even in the transcript of the reporter's notes sent up. The document does not even appear to have been filed, nor does it show what other instructions the court may have given.

Under the uniform course of authority the matters so set forth cannot be considered since not embraced in a bill of exceptions. We need do no more than cite the late case of

Ukichi vs. U. S., 281 Fed. 525, 526.

This case heard on writ of error to the same court, was sent up without a bill of exceptions in view of which the court said the questions for review were of a limited character and would not consider any of the points urged that should have been presented on bill of exceptions. Other cases in support of the same doctrine are the following:

Frohwerk vs. U. S., 249 U. S. 204, 63 L. Ed. 561;

O'Connell vs. U. S., 253 U. S. 142, 64 L. Ed. 827;

Anderson vs. U. S., 269 Fed. 65.

In the instant case, however, if we refer to statements in the reporter's transcript it will appear that the court did in fact give and instruct on the subject in all respects proper. Record page 519. It there appears that the court charged the jury,

> "It is incumbent upon the United States to establish the guilt of the defendant of the offense charged in the indictment, to the exclusion of every reasonable doubt in *the mind of each of you* before you can return a verdict of guilty. The minds of each and all of you must concur in your verdict, and if any one of you has a reasonable doubt of the defendant's guilt, you cannot convict."

It thus appears that even if the question properly arose in the record that the action of the court below was proper.

(C) THE VERDICT IS NOT CONTRADICTORY NOR IN ANY RESPECTS INVALID.

As we indicated above the first count was based upon the "Narcotic Drugs Import Act" as amended May 26, 1922, while the second count was based upon the Harrison Narcotic Act as amended in Section 1005 of the Revenue Act of 1921. The two acts denounce two separate independent crimes and in a given transaction a defendant may be shown to have violated both acts although in the particular transaction there may be an element common to both crimes. The latter act requires as a condition of criminality an element not found in the first act,

to wit, that the sale or distribution of the opium in question was from packages to which there was not affixed a tax-paid stamp, nor was it so distributed in original stamped packages. This element has no relevancy to the crime charged in the first count.

On the other, the crime charged in the first count requires that there be established the element that the opium had, to the knowledge of the defendant, been theretofore unlawfully imported and brought into the United States, which element would constitute no part of the showing necessary in regard to an alleged violation of the crime denounced in count two. It thus appears that the same evidence would not be required to secure conviction on each of the counts and that the doctrine of the case of

Morgan vs. Devine, 237 U. S., 632-639-640,

is applicable.

A similar case in point is the case of *Gavieres vs. U. S.,* 220 U. S. 338, 55 L. Ed., 489. In the latter case the Court quoted with approval from the case of *Morey vs. Commonwealth,* 108 Mass. 433, as follows:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

It thus appears that the doctrine of such cases as Rosenthal against United States, cited in the brief

of counsel for defendant, is not applicable. In that case different counts of the indictment contain statements in different forms of violations of the same identical statute and referred, as was shown by a bill of exceptions in that case to the same transaction.

Here the counts are based on two entirely separate and distinct statutes, each containing an element not found in the other. *Non con stat.,* but that the jury was unable to find against the defendant as to the element peculiar to count two, and if it should appear to be true that such holding was illogical it may be pertinently said, as was said by Judge Dickinson of the United States District Court of the Eastern District of Pennsylvania, referring to a similar case: "Mere formal logical consistency is not one of the crown jewels of juries, and happily so." (272 Fed. 505).

In conclusion we urge that the matters brought forth by plaintiff in error as reasons for the refusal of the judgment against him are wholly without merit and that the judgment should be affirmed.

JOHN T. WILLIAMS,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,

WILLIAM T. CARDEN,
United States Attorney for Hawaii,
Attorneys for Defendant in Error.